Nos. 82-1530 and 82-1533

In the Supreme Court of the United States

OCTOBER TERM, 1982

CLEVELAND TURNER, PETITIONER

v.

UNITED STATES OF AMERICA

LANDON L. WILLIAMS, WILLIAM BOYLE AND GEORGE BARONE, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General

D. LOWELL JENSEN
Assistant Attorney General

STEPHEN L. HIYAMA
Attorney

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTION PRESENTED

Whether the district court committed reversible error in replacing a juror with an alternate juror when, after jury deliberations had begun, the discharged juror began to experience psychotic episodes and became mentally unfit to serve.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Page

Cases—Continued:

Statutes:

In the Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-1530

CLEVELAND TURNER, PETITIONER

v.

UNITED STATES OF AMERICA

No. 82-1533

LANDON L. WILLIAMS, WILLIAM BOYLE AND GEORGE BARONE, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-116a[1]) is reported at 690 F.2d 1289.

JURISDICTION

The judgment of the court of appeals (Pet. App. 116a) was entered on November 4, 1982. Petitions for rehearing (Pet. App. 117a-118a) were denied on January 14, 1983. The petitions for a writ of certiorari were filed on March 15, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

---

[1]"Pet. App." references are to the petition in No. 82-1533.

STATEMENT

Following a jury trial in the United States District Court for the Southern District of Florida, petitioners were convicted of offenses stemming from a widespread payoff scheme in Miami and several other cities in the southeastern United States. The charges on which petitioners were convicted included racketeering (18 U.S.C. 1962(c)), conspiracy to engage in racketeering (18 U.S.C. 1962(d)), payment and receipt of money and things of value in exchange for labor peace (29 U.S.C. (& Supp. V) 186), extortion (18 U.S.C. 1951), receiving kickbacks in connection with a labor matter (18 U.S.C. 1954), obstruction of justice (18 U.S.C. (Supp. V) 1503), and filing false income tax returns (26 U.S.C. 7206) (Pet. App. 27a-29a).

Petitioner Barone was convicted on 20 counts and acquitted on two; he was sentenced to a total of 15 years' imprisonment and was fined $10,000.[2] Petitioner Boyle was convicted on 34 counts and acquitted on two; he was sentenced to a total of 12 years' imprisonment and was fined $8,000.[3] Petitioner Turner was convicted on six counts; he was sentenced to six years' imprisonment and was fined $8,000.[4]

---

[2]Barone was given concurrent sentences of 10 years' imprisonment and a $10,000 fine on the racketeering and racketeering-conspiracy charges (counts 1 and 2), a five-year consecutive sentence on the extortion count (count 3), and concurrent one-year terms on the income tax counts (counts 58-62) and the Taft-Hartley counts (counts 4, 6, 7, 11-13, 19, 25, 27, 31, 43 and 48).

[3]Boyle was sentenced to concurrent seven-year terms on the racketeering and racketeering-conspiracy counts (counts 1 and 2), together with an $8,000 fine on the racketeering-conspiracy count (count 1). He received a consecutive three-year term on the extortion charge (count 3), a consecutive one-year term on the Taft-Hartley, obstruction, and kickback counts (counts 4-9, 11, 13, 16, 17, 19-24, 27, 32, 33, 35, 39, 41, 43, 46, 47 and 52), and a consecutive one-year term on the income tax counts (counts 63-67).

[4]Turner received concurrent five-year terms on the racketeering and racketeering-conspiracy counts (counts 1 and 2), together with a $4,000 fine on the racketeering count (count 2), and a cumulative $4,000 fine on

Petitioner Williams was convicted on four counts; he was sentenced to five years' imprisonment and was fined $10,000.[5] The court of appeals affirmed (Pet. App. 1a-116a).

1. The evidence at trial is summarized by the court of appeals (Pet. App. 3a-27a). Briefly stated, it showed a widespread pattern of corruption among union officials and employers in a number of port cities in the southeastern United States, which lasted for a period of more than 10 years. From as far back as 1966, officials of the International Longshoremen's Association pressured employers in waterfront companies to make payments to union officers in order to obtain favorable treatment in labor matters and to obtain contracts for waterfront work. In 1975 the FBI learned about the payments and began conducting an undercover investigation. Much of the evidence at trial was obtained as a result of this undercover work; other evidence came from waterfront employers, many of whom testified at trial. The payoff scheme continued until 1977, when the investigation became public. The total amount of money involved in the payments proved at trial was in excess of $400,000.

2. The trial in this case, which included 10 defendants altogether, began January 29, 1979, and consumed more than six months. The case was submitted to the jury on

---

the racketeering-conspiracy count (count 1). He also received a consecutive one-year term on the Taft-Hartley counts (counts 5, 10, 14 and 18).

[5]Williams received concurrent sentences of five years' imprisonment and a $10,000 fine on the racketeering and racketeering-conspiracy counts (counts 1 and 2), and a concurrent one-year term on the Taft-Hartley counts (counts 9 and 15). The government dismissed one count against him (count 50).

Saturday, August 11, 1979 (Pet. App. 120a-121a). On the same day, after the jury retired to deliberate, the district court took up the question of the two remaining alternate jurors. Because "[t]here [was] still a possibility that [they would] have to serve" (*id.* at 141a), the court directed the alternates to abstain from communicating about the case with anybody, including the regular jurors (*id.* at 140a-141a). The court also ordered that the alternates be sequestered apart from the jury on a separate floor of the hotel in which both the alternate and regular jurors were staying (*id.* at 143a-144a).

The jury was excused after two and a half hours of deliberations on Saturday, August 11 (Pet. App. 29a). On Monday, August 13, jury deliberations resumed (*ibid.*). Two days later, the court called the two alternate jurors into the courtroom and released them from their sequestration (*id.* at 165a-167a). The court advised the alternates, however, that they should avoid press and television coverage of the trial, that they should not read or listen to the news, and that they should not discuss the case with their families, newspaper reporters, or anyone else, "in the slim possibility that we might still call you" (*id.* at 166a). The court further requested that the alternates not go on vacation or leave the state until a verdict was returned (*ibid.*).

On Friday, August 17, at about 1:40 p.m., the court received a note from the foreperson of the jury requesting that the jury be permitted to adjourn until Monday on account of the mental condition of one of the jurors, Dorothy Loescher (Pet. App. 169a-170a). The court permitted the adjournment. On the following Monday, the foreperson of the jury wrote another note to the court suggesting that, in her view, juror Loescher needed professional help, and explaining that the jury would be unable to resume work until the matter was resolved (*id.* at 171a). One

of the marshals reported to the court that juror Loescher was unable to concentrate on the case and was having delusions (*id.* at 172a-173a). He stated that she thought the Lord was talking to her and Lucifer was after her; he added that at one point she said she was Jesus and at another point she said she was Moses (*ibid.*).

That afternoon, the foreperson of the jury asked for permission to see the judge, and in the presence of counsel, she said juror Loescher was having hallucinations and exhibiting other symptoms of mental illness (Pet. App. 190a, 200a, 202a-203a). After further discussion, and after a psychiatrist examined juror Loescher and reported that she was undergoing a psychotic episode (*id.* at 241a-245a), the court, on Tuesday, August 21, ordered her discharged, with no objection from any of the parties (*id.* at 256a-259a, 261a). Petitioners, however, refused to proceed with an eleven-person jury (*id.* at 228a-229a, 261a-262a).

On Wednesday, August 22, the court called in alternate juror Evangelist to determine if she could be installed as the twelfth juror (Pet. App. 264a-330a). The court questioned Evangelist to determine whether she had been exposed to any publicity about the case during the period in which the jury had been deliberating. She said that she had not discussed the case with anyone, that she had not been exposed to any accounts of the case in the media, and that nothing had happened to affect her judgment in the case or her ability to give fair consideration to all parties (*id.* at 264a-265a).

The court then interviewed the 11 remaining jurors individually on the record to determine if they thought they would be able to clear their minds of any conclusions they might already have reached and begin their deliberations anew (Pet. App. 278a-327a). Each juror stated that he or she could (*id.* at 279a-280a, 284a, 288a-289a, 294a-296a, 300a,

302a-303a, 305a, 307a-309a, 311a-313a, 318a-319a, 324a-325a). On the basis of the interrogation of the alternate juror and the 11 regular jurors, the court decided to place the alternate juror on the jury and to permit deliberations to begin anew (*id.* at 32a).

On Thursday, August 23, the court reinstructed the jury in full (Pet. App. 32a). Both at the beginning of the instructions and at the end, the court advised the jurors at some length of their responsibility to begin their deliberations anew and to put out of their minds all of their deliberations up to that point (*id.* at 337a-341a). The jury then retired and deliberated for more than a week (*id.* at 32a-33a).[6] On September 1, 1979, the jury returned its verdicts (*id.* at 33a).

3. The court of appeals affirmed, finding that the substitution of the alternate juror was not reversible error (Pet. App. 29a-43a). Relying on its prior decision in *United States* v. *Phillips*, 664 F.2d 971 (5th Cir. 1981), certs. denied, Nos. 81-6444 and 81-6445 (June 21, 1982); No. 81-6868 (Oct. 12, 1982), the court held that the substitution procedure constitutes reversible error only when the defendants may have been prejudiced by the replacement (Pet. App. 34a). Here, in light of the precautions taken by the district court prior to substitution, the court found no evidence of prejudice. The court of appeals noted with approval that the district court had questioned both the alternate and the 11 remaining jurors extensively to determine whether substitution was appropriate (*id.* at 38a). The court of appeals further remarked that the district court had confiscated the jurors' notes from their preliminary deliberations and "reinstructed the jurors in full, emphasizing their duty to disregard all prior deliberations and begin afresh"

---

[6]Petitioners Williams, Boyle and Barone assert (82-1533 Pet. 12) that the reconstituted jury deliberated for only two days before returning its verdicts. This assertion is plainly mistaken. See Pet. App. 33a; 82-1530 Pet. 7.

(*id.* at 39a). The court below reasoned that the lengthy post-substitution deliberations "negate[d] any inference that the original jurors had previously decided to convict and * * * impressed that position on the alternate" (*ibid.*).

The court acknowledged that Rule 24(c) of the Federal Rules of Criminal Procedure had been technically violated (Pet. App. 42a). That rule provides, among other things, that "[a]n alternate juror who does not replace a regular juror shall be discharged after the jury retires to consider its verdict." But the court of appeals held that, in the unusual circumstances of this case, the deviation from the rule did not compel reversal. It commented, however, that its decision was a narrow one and was confined to the facts of this case (*id.* at 42a-43a):

> It is not our intention, nor is it within our province, to authorize routine deviation from the terms of Rule 24(c). That rule is "the rule" and the substituted juror procedure upheld herein is a narrowly limited exception to the rule, applicable only in extraordinary situations and, even then, only when extraordinary precautions are taken, as was done below, to ensure that the defendants are not prejudiced.

ARGUMENT

Petitioners argue that the post-submission substitution[7] of a fit alternate juror for a mentally unsound juror constitutes a ground for upsetting their convictions. We note at the outset that this Court declined, less than one year ago, to consider precisely the same issue when presented with petitions requesting review of the Fifth Circuit's decision in *Phillips*. Nos. 81-6444 and 81-6445 (denied June 21, 1982); No. 81-6868 (denied Oct. 12, 1982). Nothing has happened

---

[7] "Post-submission substitution" refers to the substitution of an alternate juror for a regular juror after jury deliberations have begun.

in the intervening months to make the issue any more worthy of review now than it was then. In any event, petitioners' contention is without merit.

As outlined above, the challenged juror substitution was made in the context of a trial of extraordinary length and complexity. And it was not until after the conclusion of the six-month trial that juror Loescher's mental infirmity manifested itself. When petitioners foreclosed the simplest answer to the problem—an 11-person jury—the district court was left with two alternatives: declare a mistrial and waste vast amounts of defense, prosecutorial, and judicial resources, or replace the disabled juror with an alternate juror, while taking all possible measures to ensure the integrity of the factfinding process and to avoid prejudice to petitioners.

The court chose the latter alternative. In doing so it scrupulously protected petitioners' right to be tried by 12 impartial jurors. It noted that the alternate juror, as she had promised, had avoided all extrinsic contacts concerning the case, including contact with the jury, and that the alternate had stated she could give petitioners "a fair trial" (Pet. App. 121a-122a). The court also individually examined the 11 remaining jurors and received assurances from each "that he or she could and would begin anew" (*id.* at 122a).* Moreover, the duty to begin anew was stressed again in the court's instructions to the reconstituted jury (*id.* at 337a-341a). The district court's enlistment of the alternate juror was, in the unusual circumstances of this complex and massive criminal prosecution, manifestly reasonable.

---

*Some of the jurors did express some reservations about having to commence their deliberations anew. A review of the trial transcript, however, discloses that these "reservations were attributable to their understandable desire to be reunited with their families rather than to any obstacle relating to their thought processes" (Pet. App. 32a). See, *e.g.*, *id.* at 279a-280a, 288-289a, 294a-296a, 299a-300a.

Petitioners nevertheless contend (82-1530 Pet. 8-21; 82-1533 Pet. 23-30) that the district court's action transgressed Rule 24(c) of the Federal Rules of Criminal Procedure. As a result, they assert, their convictions must be overturned.

Rule 24(c), however, does not specifically address the question of post-submission juror substitution. While the rule does provide for the discharge of alternate jurors once the jury retires to consider its verdict, it is generally recognized that a technical violation of Rule 24(c) does not constitute reversible error per se. *United States* v. *Hillard*, No. 82-1312 (2d Cir. Mar. 1, 1983), slip op. 2103; *United States* v. *Phillips, supra*, 664 F.2d at 994-995; *United States* v. *Allison*, 481 F.2d 468, 472, aff'd after remand, 487 F.2d 339 (5th Cir. 1973), cert. denied, 416 U.S. 982 (1974); *United States* v. *Hayutin*, 398 F.2d 944, 950 (2d Cir.), cert. denied, 393 U.S. 961 (1968). "The question * * * is whether [petitioners] were prejudiced by the substitution of the alternate after jury deliberations had begun." *United States* v. *Phillips, supra*, 664 F.2d at 993. Accord, *United States* v. *Hillard, supra*, slip op. 2103.

The Fifth and Second Circuit decisions in *Phillips* and *Hillard* are squarely on point. In both cases, the courts of appeals refused to reverse because of post-submission substitution of an alternate for a disabled juror. Like the instant case, those cases involved lengthy and complex multiple-defendant trials. See *Phillips, supra*; *Hillard, supra*, slip op. 2095. Furthermore, the district courts in those cases, like the instant district court, used "extreme precautions" that "neutralized the possible prejudice to the [petitioners]" (*Phillips, supra*, 664 F.2d at 996). As a result, the *Phillips* and *Hillard* courts concluded that the juror substitution in the context of those cases did not constitute reversible error.

The district court below was no less justified in replacing juror Loescher. Petitioners' trial was longer and involved more defendants than either *Phillips* or *Hillard*. Moreover, as the court of appeals noted, the district court implemented all the safeguards approved by the *Phillips* court in order to avoid the possibility of unfair prejudice (Pet. App. 38a-39a). And, similarly to *Phillips*, the reconstituted jury deliberated for well over a week before returning its verdicts, belying any assertion that the 11 original jurors did not begin deliberating anew or that the alternate juror failed to exercise independent judgment.

The Federal Rules of Criminal Procedure "are intended to provide for the just determination of every criminal proceeding. They shall be construed to secure simplicity in procedure, fairness in administration and the elimination of unjustifiable expense and delay." Fed. R. Crim. P. 2. They "are not, and were not intended to be, a rigid code to have an inflexible meaning irrespective of the circumstances." *Fallen* v. *United States*, 378 U.S. 139, 142 (1964). See Fed. R. Crim. P. 52(a). In this case, as in *Phillips* and *Hillard*, "[t]he substitution procedure utilized by the court did not deprive [petitioners] of their right to a full consideration of their cases by an impartial jury panel" (*Phillips, supra*, 664 F.2d at 996). In permitting the juror substitution at issue, the district court was clearly mindful of, and endeavored to protect, the interests informing Rule 24(c) (Pet. App. 129a-135a). In light of the difficult and special circumstances of this case and the principles of fairness and economy underlying the rules of criminal procedure, the district court's decision was not reversible error and warrants no further review by this Court.

Petitioners assert (82-1530 Pet. 8; 82-1533 Pet. 13) that there is a clear conflict among the circuits on the question of post-submission juror substitution. They argue principally that *United States* v. *Lamb*, 529 F.2d 1153 (9th Cir. 1975).

(en banc), conflicts with the decision in this case and with *Phillips*. Petitioners posit a false conflict, however, for *Lamb* is plainly distinguishable.

In *Lamb*, an alternate juror was excused and permitted to go home when the case was submitted to the jury. 529 F.2d at 1154-1155. The jury returned a guilty verdict after deliberating over the course of two days. *Id.* at 1155. The verdict was rejected by the district court, however, as being inconsistent with its instructions. *Ibid.* Before resubmitting the case to the jury the district court recalled the alternate juror and substituted her for a juror who had earlier informed the court that he was "emotionally unable to come to a decision." *Ibid.* The newly constituted jury returned a guilty verdict in 29 minutes. *Ibid.*

The brevity with which the second jury reached its decision led the Ninth Circuit to conclude " '[t]hat impermissible coercion upon the alternate juror in this case was manifestly inherent.' " 529 F.2d at 1156. By contrast, the instant jury, once reconstituted, took well over a week to return its verdicts—demonstrating, if anything, that alternate juror Evangelist was not impermissibly coerced. Just as important, the *Lamb* jurors had already returned a verdict—committed themselves in open court—when they were asked to begin anew; that is, they had "already agreed that the accused [was] guilty." 529 F.2d at 1156. The instant jury did not labor under this psychological handicap. No verdict had been returned when the substitution was made.[9]

---

[9]Petitioners Williams, Boyle and Barone (82-1533 Pet. 16-17) suggest that the originally constituted jury was 11-1 for convictions, with juror Loescher the lone holdout, when juror Loescher was replaced. But nothing in the record bears this out. The assertion that all 11 remaining jurors had already made up their minds to convict when the reconstituted jury began to deliberate is pure speculation.

In sum, *Lamb* was a case whose circumstances gave rise to serious doubts about the integrity of the deliberative process of the reconstituted jury. Those distinguishing circumstances were plainly absent from this case, *Phillips*, or *Hillard*. There is no "clear conflict" (82-1533 Pet. 13), therefore, between these cases and *Lamb*.

In their effort to construct an intercircuit conflict, petitioners also rely (82-1530 Pet. 11; 82-1533 Pet. 18-23) on cases concerning the different question of alternate jurors being present during the deliberations of the regular jurors. *United States* v. *Hayutin*, 398 F.2d 944 (2d Cir.), cert. denied, 393 U.S. 961 (1968), aff'd on subsequent appeal *sub nom. United States* v. *Nash*, 414 F.2d 234 (2d Cir.), cert. denied, 396 U.S. 940 (1969); *United States* v. *Virginia Erection Corp.*, 335 F.2d 868 (4th Cir. 1964); *United States* v. *Beasley*, 464 F.2d 468 (10th Cir. 1972). Because of the possibility that more than 12 persons might at the same time participate in or be able to influence deliberations, these cases hold that Rule 24(c) is violated when alternate jurors are allowed to enter the jury room rather than being discharged when a case is submitted to the jury. Petitioners assert that these cases would compel the Second, Fourth and Tenth Circuits to reject the Fifth Circuit's reasoning in this case.

Petitioners' theory, however, has been completely disproved by the Second Circuit's *Hillard* decision, which follows the approach of the court below. Moreover, the question presented in *Hayutin*, *Virginia Erection Corp.*, and *Beasley*—having more than 12 persons simultaneosly present during deliberations—is dissimilar to the post-deliberation substitution question presented here. The cases simply implicate different interests. See *Henderson* v. *Lane*, 613 F.2d 175, 177 n.5 (7th Cir.), cert. denied, 446 U.S. 986 (1980); *United States* v. *Lamb*, *supra*, 529 F.2d at 1160 (Wright, J., dissenting); *United States* v. *Beasley*, *supra*,

464 F.2d at 470; Pet. App. 136a. For example, there appears to be no sound reason for more than 12 jurors to confer simultaneously on a verdict; by contrast, as this case illustrates, there may be compelling circumstances that justify post-submission substitution of an alternate juror. Petitioners' conflict-by-analogy argument therefore is unpersuasive, demonstrating only the absence of a squarely presented, well-defined conflict below.[10]

Finally, we note that the issue raised by petitioners lacks continuing importance and hence would not warrant review by this Court even if there were an intercircuit conflict. The current Federal Rules of Criminal Procedure permit a verdict by fewer than 12 jurors only upon written stipulation of the parties and approval by the court. Fed. R. Crim. P. Rule 23(b). However, the Advisory Committee on Criminal Rules has proposed an amendment to Rule 23(b), which is currently pending before this Court, that will permit a verdict by 11 jurors "if the court finds it necessary to excuse a juror for just cause after the jury has retired to consider its verdict" (App., *infra*, 1a). The Advisory Committee Notes on the proposed amendment refer specifically to the instant case and conclude that "when a juror is lost during deliberations * * * it is essential that there be available a course of action other than mistrial" (*id.* at 2a). Because the proposed amendment would obviate the necessity for post-submission juror substitution in the circumstances of this case, there

---

[10]Petitioner Turner argues (82-1530 Pet. 16) that the replacement of juror Loescher denied him due process of law. This constitutional argument is untenable, and the court of appeals was plainly correct in rejecting it (Pet. App. 36a). See *United States* v. *Hillard*, *supra*, slip op. 2099-2101; *United States* v. *Phillips*, *supra*, 664 F.2d at 992-993; *Henderson* v. *Lane*, *supra*, 613 F.2d at 177-179.

is no need for the Court to consider whether the procedures adopted by the courts below constitute reversible error under the current version of the rules.[11]

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE
Solicitor General

D. LOWELL JENSEN
Assistant Attorney General

STEPHEN L. HIYAMA
Attorney

APRIL 1983

---

[11] In the Note accompanying the proposed amendment to Rule 23(b), the Advisory Committee on Criminal Rules, referring specifically to the instant case (and to *United States* v. *Phillips*, *supra*), characterized post-submission substitution as "the least objectionable course of action" available under current rules when the trial has been protracted and the parties decline to stipulate to an 11-person jury (App., *infra*, 4a).

DOJ-1983-04

APPENDIX

RULES OF CRIMINAL PROCEDURE

Rules 23. Trial by Jury or by the Court

* * *

(b) JURY OF LESS THAN TWELVE. Juries shall be of 12 but at any time before verdict the parties may stipulate in writing with the approval of the court that the jury shall consist of any number less than 12 or that a valid verdict may be returned by a jury of less than 12 should the court find it necessary to excuse one or more jurors for any just cause after trial commences. *Even absent such stipulation, if the court finds it necessary to excuse a juror for just cause after the jury has retired to consider its verdict, in the discretion of the court a valid verdict may be returned by the remaining 11 jurors.*

ADVISORY COMMITTEE NOTE

Rule 23(b)

The amendment to subdivision (b) addresses a situation which does not occur with great frequency but which, when it does occur, may present a most difficult issue concerning the fair and efficient administration of justice. This situation is that in which, after the jury has retired to consider its verdict and any alternate jurors have been discharged, one of the jurors is seriously incapacitated or otherwise found to be unable to continue service upon the jury. The problem is acute when the trial has been a lengthy one and consequently the remedy of mistrial would necessitate a second

expenditure of substantial prosecution, defense and court resources. See, e.g., *United States* v. *Meinster*, 484 F. Supp. 442 (S.D. Fla. 1980), aff'd sub nom. *United States* v. *Phillips*, 664 F.2d 971 (5th Cir. 1981) (juror had heart attack during deliberations after "well over four months of trial"); *United States* v. *Barone*, 83 F.R.D. 565 (S.D. Fla. 1979) (juror removed upon recommendation of psychiatrist during deliberations after "approximately six months of trial").

It is the judgment of the Committee that when a juror is lost during deliberations, especially in circumstances like those in *Barone* and *Meinster*, it is essential that there be available a course of action other than mistrial. Proceeding with the remaining 11 jurors, though heretofore impermissible under rule 23(b) absent stipulation by the parties and approval of the court, *United States* v. *Taylor*, 507 F.2d 166 (5th Cir. 1975), is constitutionally permissible. In *Williams* v. *Florida*, 399 U.S. 78 (1970), the Court concluded

> the fact that the jury at common law was composed of precisely 12 is an historical accident, unnecessary to effect the purposes of the jury system and wholly without significance "except to mystics." * * * To read the Sixth Amendment as forever codifying a feature so incidental to the real purpose of the Amendment is to ascribe a blind formalism to the Framers which would require considerably more evidence than we have been able to discover in the history and language of the Constitution or in the reasoning of our past decisions. * * * Our holding does no more than leave these considerations to Congress and the States, unrestrained by an interpretation of the Sixth Amendment which would forever dictate the precise number which can constitute a jury.

Williams held that a six-person jury was constitutional because such a jury had the "essential feature of a jury," i.e., "the interposition between the accused and his accuser of the common-sense judgment of a group of laymen, and in the community participation and shared responsibility which results from that group's determination of guilt or innocence," necessitating only a group "large enough to promote group deliberation, free from outside attempts at intimidation, and to provide a fair possibility for obtaining a representative cross section of the community." This being the case, quite clearly the occasional use of a jury of slightly less than 12, as contemplated by the amendment to rule 23(b), is constitutional. Though the alignment of the Court and especially the separate opinion by Justice Powell in *Apodoca* v. *Oregon*, 406 U.S. 404 (1972), makes it at best uncertain whether less-than-unanimous verdicts would be constitutionally permissible in federal trials, it hardly follows that a requirement of unanimity of a group slightly less than 12 is similarly suspect.

The *Meinster* case clearly reflects the need for a solution other than mistrial. There twelve defendants were named in a 36-count, 100-page indictment for RICO offenses and related violations, and the trial lasted more than four months. Before the jury retired for deliberations, the trial judge inquired of defense counsel whether they would now agree to a jury of less than 12 should a juror later be unable to continue during the deliberations which were anticipated to be lengthy. All defense counsel rejected that proposal. When one juror was excused a day later after suffering a heart attack, all defense counsel again rejected the proposal that deliberations continue with the remaining 11 jurors. Thus, the solution now provided in rule 23(b), stipulation to a jury of less than 12, was not possible in that case, just as it

will not be possible in any case in which defense counsel believe some tactical advantage will be gained by retrial. Yet, to declare a mistrial at that point would have meant that over four months of trial time would have gone for naught and that a comparable period of time would have to be expended on retrial. For a variety of reasons, not the least of which is the impact such a retrial would have upon that court's ability to comply with speedy trial limits in other cases, such a result is most undesirable.

That being the case, it is certainly understandable that the trial judge in *Meinster* (as in *Barone*) elected to substitute an alternate juror at that point. Given the rule 23(b) bar on a verdict of less than 12 absent stipulation, *United States* v. *Taylor*, supra, such substitution seemed the least objectionable course of action. But in terms of what change in the Federal Rules of Criminal Procedure is to be preferred in order to facilitate response to such situations in the future, the judgment of the Advisory Committee is that it is far better to permit the deliberations to continue with a jury of 11 than to make a substitution at that point.

In rejecting the substitution-of-juror alternative, the Committee's judgment is in accord with that of most commentators and many courts.

> There have been proposals that the rule should be amended to permit an alternate to be substituted if a regular juror becomes unable to perform his duties after the case has been submitted to the jury. An early draft of the original Criminal Rules had contained such a provision, but it was withdrawn when the Supreme Court itself indicated to the Advisory Committee on Criminal Rules doubts as to the desirability and constitutionality of such a procedure. These

> doubts are as forceful now as they were a quarter century ago. To permit substitution of an alternate after deliberations have begun would require either that the alternate participate though he has missed part of the jury discussion, or that he sit in with the jury in every case on the chance he might be needed. Either course is subject to practical difficulty and to strong constitutional objection.

Wright, *Federal Practice and Procedure* § 388 (1969). See also Moore, *Federal Practice* par. 24.05 (2d ed. Cipes 1980) ("The inherent coercive effect upon an alternate who joins a jury leaning heavily toward a guilty verdict may result in the alternate reaching a permature guilty verdict"); 3 *ABA Standards for Criminal Justice* § 15-2.7, commentary (2d ed. 1980) ("it is not desirable to allow a juror who is unfamiliar with the prior deliberations to suddenly join the group and participate in the voting without the benefit of earlier group discussion"); *United States* v. *Lamb*, 529 F.2d 1153 (9th Cir. 1975); *People* v. *Ryan*, 19 N.Y.2d 100, 224 N.E.2d 710 (1966). Compare *People* v. *Collins*, 17 Cal.3d 687, 131 Cal. Rptr. 782, 522 P.2d 742 (1976); *Johnson* v. *State*, 267 Ind. 256, 396 N.E.2d 623 (1977).

The central difficulty with substitution, whether viewed only as a practical problem or a question of constitutional dimensions (procedural due process under the Fifth Amendment or jury trial under the Sixth Amendment), is that there does not appear to be any way to nullify the impact of what has occurred without the participation of the new juror. Even were it required that the jury "review" with the new juror their prior deliberations or that the jury upon substitution start deliberations anew, it still seems likely that the

continuing jurors would be influenced by the earlier deliberations and that the new juror would be somewhat intimidated by the others by virtue of being a newcomer to the deliberations. As for the possibility of sending in the alternate at the very beginning with instructions to listen but not to participate until substituted, this scheme is likewise attended by practical difficulties and offends "the cardinal principle that the deliberations of the jury shall remain private and secret in every case." *United States* v. *Virginia Erection Corp.*, 335 F.2d 868 (4th Cir. 1964).

The amendment provides that if a juror is excused after the jury has retired to consider its verdict, it is within the discretion of the court whether to declare a mistrial or to permit deliberations to continue with 11 jurors. If the trial has been brief and not much would be lost by retrial, the court might well conclude that that unusual step of allowing a jury verdict by less than 12 jurors absent stipulation should not be taken. On the other hand, if the trial has been protracted the court is much more likely to opt for continuing with the remaining 11 jurors.